

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

10 JERRI BOON,)
11 Plaintiff,) 03:10-cv-01044-HU
12 vs.) FINDINGS AND
13 UNION PACIFIC RAILROAD CO.,) RECOMMENDATION
14 et. al.,)
15 Defendants.)

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1 HUBEL, Magistrate Judge:

2 **Introduction**

3 Defendants Union Pacific Railroad Company ("Union Pacific"),
 4 Brother of Locomotive Engineers and Trainmen ("BLET"), and United
 5 Transportation Union ("United") (collectively "Defendants") move to
 6 dismiss plaintiff Jerri Boon's ("Boon") Amended Complaint pursuant
 7 to Federal Rules of Civil Procedure ("Rule") 12(b) (5) and (6) for
 8 insufficient service of process and failure to state a claim upon
 9 which relief can be granted.¹ For the reasons set forth below,
 10 BLET's motion [10] to dismiss should be GRANTED, United's motion
 11 [17] to dismiss should be GRANTED, and Union Pacific's motion [18]
 12 to dismiss should be GRANTED in part and DENIED in part.

13 **Background²**

14 Boon filed her original complaint on September 2, 2010. (Doc.
 15 #1.) On December 30, 2010, Boon filed her first amended complaint
 16 ("FAC") (doc. #6), wherein she brings claims for: gender-based
 17 discrimination in employment in violation of 42 U.S.C. § 2000e;
 18 intentional infliction of emotional distress; wrongful termination;
 19 breach of contract; breach of implied contract; defamation; a state
 20 law gender discrimination claim; and a federal claim of
 21 retaliation. (FAC ¶¶ 11-62.) Boon also seeks punitive and
 22 exemplary damages. (FAC ¶¶ 63-65.)

23

24

25 ¹ BLET's motion (doc. #10) is based solely on Rule 12(b) (5),
 26 whereas United's motion (doc. #17) and Union Pacific's motion (doc.
 27 #18) are based on Rule 12(b) (5) and (6).

² Unless otherwise indicated, the following facts are taken
 28 from Boon's Amended Complaint (hereinafter, "FAC"). (Doc. #6.)

1 On or about March 13, 1974, Boon began working for Union
2 Pacific as an entry-level railroad telegrapher. (FAC ¶ 12.)
3 During the next three decades Boon was offered and accepted a
4 series of promotions and differing job assignments. (FAC ¶ 12.)
5 Boon claims that in May of 2004, her immediate supervisors, with
6 the apparent approval of Union Pacific, began acting in a
7 discriminatory and demeaning manner towards her based on her
8 gender. (FAC ¶ 13.) For example, Boon claims that Union Pacific
9 allowed her to be publically humiliated by means of threatening,
10 false and slanderous accusation of dereliction of duty, unwarranted
11 disciplinary actions, and requiring subordinates to perform actions
12 which contravened established company policy. (FAC ¶ 13.)

13 Boon further claims that BLET and United condoned these
14 activities. (FAC ¶ 14.) In essence, Boon argues that BLET and
15 United were contractually obligated to investigate and report on
16 her union-filed grievance and their failure to do so demonstrates
17 their acceptance of Union Pacific's conduct. (FAC ¶ 14.) As an
18 example, Boon offers a July 15, 2004, incident where she was
19 falsely accused of violating Union Pacific's company policy by
20 sleeping on the job and was not given an opportunity to contest or
21 defend against the charges. (FAC ¶ 15.) Boon says this was in
22 spite of and in conflict with a specific "train order" that
23 permitted her and fellow employees to "nap" during down times when
24 they were still technically on duty, but when there were no actual
25 job functions to be performed. (FAC ¶ 15.)

26 Despite Boon's denial of the charges and her claim that she
27 was protected by the "nap rule," Union Pacific still placed a
28 disciplinary notation in Boon's employment file. (FAC ¶ 16.) Boon

1 claims that this had a detrimental effect on her "point score" that
 2 served as Union Pacific's benchmark for issuing promotions and
 3 raises. (FAC ¶ 16.)

4 On or about June 20, 2008, Boon was essentially terminated
 5 from her position when Union Pacific placed her on unpaid leave.
 6 (FAC ¶ 17.) According to Boon, the unpaid leave was unwarranted
 7 and unrelated to her job performance, "but was instead enacted
 8 against her, for the alleged failure to participate in an
 9 unnecessary and superfluous so-called 'medical examination;' the
 10 demanded medical examination however, was, in fact, a pretext to
 11 enable [Union Pacific] to discriminate and retaliate against [her],
 12 for alleging that acts of illegal, gender-based discrimination had
 13 been committed against her by [Union Pacific]'s employees." (FAC
 14 ¶ 17.) Boon claims she was not given an opportunity to defend or
 15 explain her alleged transgressions, nor any avenue of appeal. (FAC
 16 ¶ 18.)

17 Subsequent to her termination, Boon has allegedly suffered
 18 financial, emotional, and personal tribulation as a result of
 19 Defendants' actions. (FAC ¶ 19.) Boon also claims that Union
 20 Pacific and its employees continue to defame and slander her by
 21 stating she was terminated for violation of company policy thereby
 22 damaging Boon's personal and professional reputation. (FAC ¶ 20.)

23 **Legal Standard**

24 **I. Rule 12(b) (5)**

25 Pursuant to Rule 12(b) (5), a defendant can move to dismiss the
 26 action where the service of process of a summons and complaint is
 27 insufficient. FED. R. CIV. P. 12(b) (5). The plaintiff bears the
 28 burden of establishing the validity of service of process. Aetna

1 *Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635
 2 F.2d 434, 435 (5th Cir. 1981) ("When service of process is
 3 challenged, the party on whose behalf it is made must bear the
 4 burden of establishing its validity."); *Neilson v. Beck*, No. CV-94-
 5 520-FR, 1994 WL 578465, at *3 (D. Or. Oct. 18, 1994) ("Once a party
 6 has challenged the sufficiency of process under Rule 12(b)(5), the
 7 party on whose behalf service is made has the burden of
 8 establishing its validity.")

9 The court may consider evidence outside the pleadings in
 10 resolving a Rule 12(b)(5) motion. See *Lachick v. McMonagle*, No.
 11 CIV. A. 97-7369, 1998 WL 800325, at *2 (E.D. Pa. Nov. 16,
 12 1998) ("Factual contentions regarding the manner in which service
 13 was executed may be made through affidavits, depositions, and oral
 14 testimony.")

15 **II. Rule 12(b)(6)**

16 A court may dismiss a complaint for failure to state a claim
 17 upon which relief can be granted pursuant to Rule 12(b)(6). In
 18 considering a Rule 12(b)(6) motion to dismiss, the court must
 19 accept all of the claimant's material factual allegations as true
 20 and view all facts in the light most favorable to the claimant.
 21 *Reynolds v. Giusto*, No. 08-CV-6261, 2009 WL 2523727, at *1 (D. Or.
 22 Aug. 18, 2009). The Supreme Court addressed the proper pleading
 23 standard under Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*, 550
 24 U.S. 544 (2007). *Twombly* established the need to include facts
 25 sufficient in the pleadings to give proper notice of the claim and
 26 its basis"

27 While a complaint attacked by a Rule 12(b)(6) motion to
 28 dismiss does not need detailed factual allegations, a
 plaintiff's obligation to provide the grounds of his

1 entitlement to relief requires more than labels and
 2 conclusions, and a formulaic recitation of the elements
 3 of a cause of action will not do.

4 *Id.* at 555 (brackets omitted).

5 Since *Twombly*, the Supreme Court has clarified that the
 6 pleading standard announced therein is generally applicable to
 7 cases governed by the Rules, not only to those cases involving
 8 antitrust allegations. *Ashcroft v. Iqbal*,---U.S.---, 129 S. Ct.
 9 1937, 1949 (2009). The *Iqbal* court explained that *Twombly* was
 10 guided by two specific principles. First, although the court must
 11 accept as true all facts asserted in a pleading, it need not
 12 accept as true any legal conclusion set forth in a pleading. *Id.*
 13 Second, the complaint must set forth facts supporting a plausible
 14 claim for relief and not merely a possible claim for relief. *Id.*
 15 The court instructed that “[d]etermining whether a complaint
 16 states a plausible claim for relief will . . . be a context-
 17 specific task that requires the reviewing court to draw on its
 18 judicial experience and common sense.” *Iqbal*, 129 S. Ct. at 1949-
 19 50 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007)).
 20 The court concluded: “While legal conclusions can provide the
 21 framework of a complaint, they must be supported by factual
 22 allegations. When there are well-pleaded factual allegations, a
 23 court should assume their veracity and then determine whether they
 24 plausibly give rise to an entitlement to relief.” *Id.* at 1950.

25 The Ninth Circuit further explained the *Twombly-Iqbal*
 26 standard in *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir.
 27 2009). The *Moss* court reaffirmed the *Iqbal* holding that a “claim
 28 has facial plausibility when the plaintiff pleads factual content
 that allows the court to draw the reasonable inference that the

1 defendant is liable for the misconduct alleged." *Moss*, 572 F.3d
2 at 969 (quoting *Iqbal*, 129 S. Ct. at 1949). The court in *Moss*
3 concluded by stating: "In sum, for a complaint to survive a motion
4 to dismiss, the non-conclusory factual content, and reasonable
5 inference from that content must be plausibly suggestive of a
6 claim entitling the plaintiff to relief." *Moss*, 572 F.3d at 969.

7 **Discussion**

8 **I. Defendants' Rule 12(b) (5) Motions to Dismiss**

9 **A. Union Pacific**

10 On February 6, 2011, Union Pacific's counsel spoke with the
11 process server, Michel Wagner ("Wagner"), regarding the alleged
12 service of the Summons and FAC on Union Pacific. (Dec. Sarah
13 Turner (doc. #20) ¶ 2.) Wagner claimed that on December 31, 2010,
14 he served the Summons and FAC at the Union Pacific railroad yard
15 located on "River Street." (*Id.* ¶ 3.) Wagner apparently went
16 into a break room where six men were sitting around a table and
17 asked who was in charge. (*Id.* ¶ 4.) Mark Allen ("Allen") stood
18 up and said something to the effect of, "I am in charge when no
19 else is in the office." (*Id.*) Allen then handed the Summons and
20 FAC to Allen, but Allen never forwarded the Summons and FAC to
21 anyone authorized to accept service on behalf of Union Pacific.
22 (*Id.*) Union Pacific's registered agent is CT Corporation System,
23 located at 388 State Street, Suite 420, Salem, Oregon, 97301.
24 (*Id.* ¶ 5.) Union Pacific claims that they have not yet been able
25 to confirm the identity or position of Allen. (Mem. Supp. Mot.
26 Dismiss (doc. #19) at 4-5.) Union Pacific therefore claims that
27 Boon's FAC should be dismissed for insufficient service of
28 process. (*Id.* at 5.)

1 **B. United**

2 Similarly, Boon attempted to serve United on December 31,
 3 2010. (Pl.'s Resp. (doc. #36-1) at 3.) United claims that Boon
 4 failed to personally serve an officer or agent of their
 5 organization. (United's Mem. Supp. Mot. Dismiss (doc. #17) at 4.)
 6 According to United, "[a]lthough it is contended that service was
 7 made on '30-year old Ashley Todd,' service was actually made upon
 8 15-year old 'Ashley Crawford,' the step-daughter of Bradley Todd
 9 who is the Secretary and Treasurer for [United] Local 283." (*Id.*)
 10 Ashley Crawford is not an officer of United and was not an agent
 11 authorized to receive service for United. (*Id.*)

12 Kim Thompson is the general secretary and treasurer for
 13 United. (Decl. Kim Thompson (doc. #17-3) ¶ 1.) United
 14 International, which is the administrative head of the union, is
 15 headquartered in North Olmsted, Ohio. (*Id.* ¶ 3.) Locals, who are
 16 chartered by United International, are separate bodies who elect
 17 their own officers and conduct their own business. (Def. United's
 18 Mem. Supp. (doc. #17) at 4 n.3.)

19 **C. BLET**

20 According to BLET, Boon served the FAC on Paul Bovarnick
 21 ("Bovarnick") on December 31, 2010. (Decl. Harold Ross (doc. #10)
 22 at 3.) However, Bovarnick is neither an officer, agent, or
 23 representative of BLET. BLET claims Bovarnick "was not, and is
 24 not, designated or authorized to accept service on BLET's behalf
 25 and has no authority to act on behalf of BLET." (*Id.*) Apparently,
 26 Bovarnick's relationship with BLET is that of a private attorney
 27 on a list of counsel whom BLET recommends to its members who
 28 suffer personal injuries in the workplace. (*Id.*)

1 **D. Application of Rule 4**

2 To determine whether service of process was proper, courts
 3 look to the requirements of Rule 4, which authorizes service on a
 4 corporation by personal service on an officer, a managing or
 5 general partner, or any agent authorized by appointment of law to
 6 receive service of process. FED. R. CIV. P 4(h)(1). In *Hasdell v.*
 7 *Sickon*, No. CV 08-1101-MO, 2009 WL 1290851 (D. Or. May 5, 2009),
 8 this court recognized that, "[t]he Ninth Circuit upholds a 'policy
 9 of liberal construction in favor of *pro se* litigants.'" *Id.* at *2
 10 (quoting *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998)).
 11 However, a district court may dismiss an action when a *pro
 12 se* plaintiff has failed to comply with the Federal Rules of Civil
 13 Procedures. *Id.*

14 Boon only offers the following explanation in support of the
 15 manner in which Defendants were served: "Process server Michel
 16 Wagner is a licensed [p]rocess server for the state of Oregon. He
 17 states that he was within his legal right to serve the [Union
 18 Pacific] in the manner he did." (Pl.'s Resp. (doc. #35) at 2.)
 19 And, "Michel Wagner is a licensed [p]rocess [s]erver in the state
 20 of Oregon. He states that he was well within his legal rights in
 21 serving both" BLET and United. (Pl.'s Resp. (doc. #36) at 1.)

22 Because Boon fails to establish that she properly effected
 23 service on Union Pacific, United, or BLET, service on Defendants
 24 should be quashed. See *S.J. v. Issaquah Sch. Dist.* No. 411, 470
 25 F.3d 1288, 1293 (9th Cir. 2008) (if service of process is
 26 insufficient, the district court has discretion to dismiss or
 27 quash service). In accordance with my recommendations below, even
 28 if service on Defendants had been proper, only Boon's contract

1 claims and defamation claim against Union Pacific would survive
 2 this motion to dismiss, if she properly serves Union Pacific or if
 3 it now waives service.

4 **II. Union Pacific and United's Rule 12(b) (6) Motions to Dismiss**

5 It is well settled that the court must liberally construe a
 6 *pro se* pleading and, prior to dismissal, inform the plaintiff of
 7 the deficiencies and provide an opportunity to cure if it appears
 8 feasible. See *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir.
 9 2000); see also *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,
 10 699 (9th Cir. 1990) (noting that *pro se* pleadings should be
 11 liberally construed, particularly where civil rights claims are
 12 involved); see also *Hebbe v. Pliler*, 627 F.3d 338, 342 n.7 (9th
 13 Cir. 2010) (indicating that courts should construe *pro se* filings
 14 liberally even when evaluating them under *Iqbal*).

15 **A. Union Pacific**

16 In addition to defective service, Union Pacific claims that
 17 Boon's FAC should also be dismissed because Boon fails to state a
 18 claim for which relief can be granted. (Mem. Supp. Mot. Dismiss
 19 (doc. #19) at 5.)

20 **1. Boon's Federal Discrimination and Retaliation
 21 Claims**

22 Union Pacific claims that Boon is precluded from bringing a
 23 federal discrimination or retaliation claim because the statute of
 24 limitations has passed. (Mem. Supp. Mot. Dismiss (doc. #19) at 8,
 25 9, 12.) I agree. As Union Pacific correctly points out, a
 26 statute of limitations defense may be raised by a motion to
 27 dismiss, if the running of the statute is apparent from the face
 28 of the complaint. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682

1 (9th Cir. 1980). Such a motion can only be granted if the
 2 assertions of the complaint, which must be read with liberality,
 3 would not permit the plaintiff to prove the statute was tolled.

4 *Id.*

5 Union Pacific notes that, "although Boon does not allege it
 6 in her Amended Complaint, on August 1[8], 2009, she received a
 7 notice of right to sue letter from BOLI regarding her dual filed
 8 Charge with the EEOC. Boon has filed this Amended Complaint well
 9 past the statutory deadline of ninety days." (*Id.* at 9.) The
 10 notice of right to file a civil suit issued by BOLI references
 11 Boon's EEOC case number; however, it also makes clear that,
 12 "[a]fter 90 calendar days from this date, the right to file in
 13 state circuit court is lost." (Decl. Sarah Turner Ex. 2.) BOLI's
 14 notice therefore only impacts Boon's right to seek redress for
 15 violations of state law.³

16 The Ninth Circuit has recognized that a plaintiff may not
 17 evade dismissal by purposefully omitting the date of a right-to-
 18 sue letter from their complaint or by failing to attach a copy of
 19 the letter to the complaint. *Wynn v. Clark County Bd. of Com'rs*,
 20 74 Fed. Appx. 808, 809 (9th Cir. 2003); see also *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (holding that a plaintiff
 21 may not "surviv[e] a Rule 12(b)(6) motion by deliberately omitting
 22 references to documents upon which [its] claims are based[.]"),
 23 superseded by statute on other ground as recognized in *Abrego v.*

24
 25
 26 ³See *Morgan v. Interfor Pac., Inc.*, No. CV-08-3105-CL, 2009 WL
 27 723341, at *3 (D. Or. Mar. 13, 2009) (noting that EEOC notices
 28 impact the ability to file federal claims while BOLI notices impact
 the ability to file claims based on state law).

1 *Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006). "Similarly, the
 2 district court's consideration of a right-to-sue letter d[oes] not
 3 convert the defendants' motion to dismiss into one for summary
 4 judgment." *Wynn*, 74 Fed. Appx. at 809.

5 Here, the record indicates that Boon received an EEOC notice
 6 of right to sue letter on September 24, 2009, in addition to
 7 receiving BOLI's notice of right to letter on August 18, 2009.
 8 (Decl. Sarah Turner (doc. #20) Ex. 4 at 2; Pl.'s Resp. Mot.
 9 Dismiss (doc. #35) at 1.) Pursuant to 42 U.S.C. § 2000e-5(f)(1),
 10 there is a statutory 90-day period allowed for filing suits after
 11 receipt of an EEOC notice of right to sue. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 178 n.3 (1982). Since Boon
 12 received the EEOC's notice on September 24, 2009, the 90-day
 13 period began to run on September 25, 2009, and accordingly, ran
 14 until December 24, 2009, at which point she lost her right to file
 15 a civil suit on federal grounds. See *Morgan v. Interfor Pac., Inc.*, No. CV-08-3105-CL, 2009 WL 723341, at *3 (D. Or. Mar. 13,
 16 2009). Boon did not file this action until September 2, 2010.
 17 Accordingly, Boon's federal discrimination and retaliation claims
 18 should be dismissed.

21 **2. Boon's Intentional Infliction of Emotional
 22 Distress Claim**

23 Union Pacific next contends that Boon's intentional
 24 infliction of emotional distress ("IIED") claims is untimely
 25 because, in Oregon, such a claim is subject to a two year statute
 26 of limitations. (Mem. Supp. Mot. Dismiss (doc. #19) at 9.)

27 Under Oregon law, an IIED claim carries a two-year statute of
 28 limitations. *Quillen v. Roseburg Forest Prods., Inc.*, 159 Or.

1 App. 6, 8 (1999) (citing ORS 12.110(1)). Here, the crux of Boon's
 2 claim surrounds the events leading up to and culminating in her
 3 termination on June 20, 2008. However, construing her complaint
 4 liberally, even after *Iqbal*, Boon could potentially be pleading a
 5 claim within the statute of limitations. Boon states that,
 6 "subsequent to [her] termination . . . Union Pacific . . .
 7 continued to defame and slander" her by informing former co-
 8 workers that she was suspended for violating company policy. (FAC
 9 ¶ 20.) Thus, Union Pacific's tortious conduct allegedly continued
 10 past June 20, 2008. The FAC does not clearly state when these
 11 later "publications" were made and thus they could have
 12 potentially occurred within the two-year statute of limitations.

13 However, Boon's IIED claim does not pass muster under
 14 *Twombly*'s facial plausibility standard. To state a claim for
 15 IIED, a plaintiff must plead and prove the following elements:
 16 "(1) the defendant intended to inflict severe emotional distress
 17 on the plaintiff, (2) the defendant's acts were the cause of the
 18 plaintiff's severe emotional distress, and (3) the defendant's
 19 acts constituted an extraordinary transgression of the bounds of
 20 socially tolerable conduct." *Delaney v. Clifton*, 180 Or. App.
 21 119, 129 (2002).

22 Here, the only basis for Boon's IIED claim that is within the
 23 statute of limitations is her allegations that Union Pacific
 24 and/or their employees continue to inform people that she was
 25 suspended for violating company policy. Such conduct does not
 26 constitute an extraordinary transgression of the bounds of
 27 socially tolerable conduct. Accordingly, Boon's IIED claim should
 28 be dismissed. See *Vasconcellos v. Wells Fargo Home Loan Mortg.*,

1 *Inc.*, No. CV-10-757-KI, 2010 WL 3732232, at * (D. Or. Sept. 20,
 2 2010) (holding that the plaintiff did not satisfy pleading
 3 requirements for IIED due, in part, to failing to allege that the
 4 defendant's acts constituted an extraordinary transgression of the
 5 bounds of socially tolerable conduct); see also *Ellis v. GMAC
 6 Mortg., Inc.*, No. CV-10-6319-TC, 2011 WL 1086530, at *2 (D. Or.
 7 Mar. 16, 2011) (noting that an IIED claim failed to meet *Twombly's*
 8 standard because "there is no indication that Defendants' conduct
 9 was an extraordinary transgression of the bounds of socially
 10 tolerably conduct").

11 **3. Boon's Wrongful Termination Claim**

12 Union Pacific claims that Boon's wrongful termination claim
 13 should also be dismissed because wrongful discharge is a state
 14 common law claim with a statute of limitation of two years. (Mem.
 15 Supp. Mot. Dismiss (doc. #19) at 9.) Additionally, Union Pacific
 16 contends that allegations within the FAC do not constitute a
 17 wrongful discharge claim under Oregon law. (*Id.* at 10.)

18 In Oregon, a common-law wrongful discharge claim is subject
 19 to a two-year statute of limitations. *Stupek v. Wyle Laboratories
 20 Corp.*, 327 Or. 433, 435 (1998) (citing ORS 12.110(1)). There are
 21 two elements of a wrongful discharge claim: there must be a
 22 discharge and that discharge must be wrongful. *Id.* at 438. The
 23 discharge occurs when the employment relationship between the
 24 employee and the employer ends. *Id.* at 439. Here, Boon's claims
 25 that she was effectively terminated on June 20, 2008. (FAC ¶ 17,
 26 18.) Based on a two year statute of limitations, Boon had until
 27 June 20, 2010, to file a wrongful discharge claim against Union
 28 Pacific. Instead, Boon filed this suit on September 2, 2010.

1 Thus, Boon's wrongful discharge claim is time barred and should be
 2 dismissed.

3 **4. Boon's State Law Claims**

4 Boon has also alleged that she was discriminated against on
 5 the basis of her gender in violation of Oregon's discrimination
 6 laws. (FAC ¶¶ 54-58.) According to Union Pacific, to assert a
 7 discrimination claim under Oregon state law, the individual must
 8 assert a claim within one year of the discriminatory act.⁴
 9 Additionally, Union Pacific claims that, "when an individual has
 10 filed a discrimination complaint with BOLI, and has received
 11 notice of right to sue, the individual has ninety days from
 12 receipt of the notice to file a civil action." (Mem. Supp. Mot.
 13 Dismiss (doc. #19) at 12.)

14 *Morgan v. Interfor Pac., Inc.*, No. CV-08-3105-CL, 2009 WL
 15 723341 (D. Or. Mar. 13, 2009), is instructive on this matter. In
 16 *Morgan*, the plaintiff had received a notice of right to sue from
 17 the EEOC and BOLI. *Id.* at *3. The plaintiff received the BOLI
 18 letter on June 6, 2008. "The 90 day period began on June 7, 2008,
 19 and accordingly ran until September 4, 2008, at which point he
 20 lost his right to file a civil suit on state law grounds." *Id.*
 21 (emphasis added.) Specifically, the plaintiff lost his right to
 22 file his claim for unlawful employment practices. *Id.*

23 Similarly, in this case, as in *Morgan*, Boon lost her right to
 24 file a claim for unlawful employment practices. The record
 25 indicates that Boon received her last notice of right to sue from
 26

27

 28 ⁴ Boon was terminated on June 20, 2008, and the statute of limitations would have expired June 20, 2009. This action was filed on September 2, 2010.

1 BOLI on August 18, 2009. The 90 day period thus began on August
 2 19, 2009, and accordingly ran until November 17, 2009. Boon filed
 3 this suit on September 2, 2010, long after losing her right to
 4 file a civil suit on state law grounds. Accordingly, Boon's state
 5 law gender-based discrimination claim is time barred and should be
 6 dismissed.

7 **5. Boon's Breach of Contract/Breach of Implied
 8 Contract Claim**

9 Union Pacific next argues that, "Boon alleges that defendants
 10 breached an employment contract and the implied covenant of good
 11 faith and fair dealing contained within a contract." (Mem. Supp.
 12 Mot. Dismiss (doc. #19) at 11.) However, according to Union
 13 Pacific, Boon's complaint does not allege or suggest that Boon had
 14 an employment contract with them. (*Id.*) Union Pacific thus
 15 claims that, even if Boon had an employment contract, the implied
 16 covenant of good faith and fair dealing is a common law claim
 17 which must be commenced within two years. (*Id.*) Union Pacific
 18 relies on *Caplener v. U.S. Nat. Bank of Or.*, 317 Or. 506, 522
 19 (1993), for the proposition that, "the implied covenant of good
 20 faith and fair dealing is a common law claim, and the claim must
 21 be commenced within two years." (*Id.*)

22 Here, the court disagrees with Union Pacific's
 23 characterization of Boon's FAC. Union Pacific is correct that, to
 24 state a claim for breach of contract, a plaintiff must allege the
 25 existence of a contract. *Slover v. Or. State Bd. of Clinical Soc.*
Workers, 144 Or. App. 565, 570 (1996). However, the FAC is not
 26 entirely devoid of allegations regarding the existence of a
 27 contract. In fact, Boon unequivocally states that,
 28

1 "Defendants . . . are in material breach of the terms of [Boon]'s
 2 contract of employment . . . and of the implied covenant of good
 3 faith and fair dealing." (FAC ¶ 40.) The statute of limitations
 4 for contract claims, whether express or implied, is six years.
 5 *Angelini v. Delaney*, 156 Or. App. 293 (1998) (citing ORS
 6 12.080(1)). Thus, Boon's contract claims are timely since they
 7 have been filed within the six-year statute of limitations.

8 **6. Boon's Defamation Claim**

9 Next, Union Pacific argues that Boon's defamation claim is
 10 untimely because it has not be filed within the one year statute
 11 of limitations. (Mem. Supp. Mot. Dismiss (doc. #19) at 11.)
 12 According to Union Pacific, on the face of the FAC, Boon's
 13 defamation claim relates to Boon's allegations surrounding her
 14 termination on June 20, 2008. (*Id.*)

15 "To establish a claim for defamation, a plaintiff must show,
 16 first, that the defendant made a defamatory statement about the
 17 plaintiff to a third person." *Wallulis v. Dymowski*, 323 Or. 337,
 18 342-43 (1996). Second, the defamatory statement must be published
 19 or communicated, which is an essential element of an action for
 20 defamation. *Id.* at 343. "A defamatory statement is a false
 21 statement that would subject the plaintiff 'to hatred, contempt or
 22 ridicule . . [or] tend to diminish the esteem, respect, goodwill
 23 or confidence in which [the plaintiff] is held or to excite
 24 adverse, derogatory or unpleasant feelings or opinions against
 25 [the plaintiff]'. *Turba v. Cooke*, 233 Or. App. 339, 347-48 (2010)
 26 (quoting *Farnsworth v. Hyde*, 266 Or. 236, 238 (1973)). It is the
 27 court's prerogative to determine whether a communication is
 28

1 capable of defamatory meaning. *Reesman v. Highfill*, 327 Or. 597,
 2 604 (1998).

3 In Oregon, defamation claims are governed by a one-year
 4 statute of limitations. *Bachmeier v. Tuttle*, 195 Or. App. 83, 87
 5 n.2 (2004) (citing ORS 12.120). The difficulty I have in
 6 determining whether Boon's defamation claim is time barred is that
 7 Boon claims Union Pacific and/or their employees "continue" to
 8 defame and slander her, without pinpointing when the
 9 "publications" post termination took place. (FAC ¶ 20) Thus,
 10 construing Boon's *pro se* complaint liberally, I cannot recommend
 11 granting Union Pacific's motion on this ground.

12 **7. Boon's Punitive and Exemplary Damages Claim**

13 Finally, Boon's eighth claim for relief is for punitive and
 14 exemplary damages. (FAC ¶¶ 63-65.) According to Union Pacific,
 15 "Boon is not entitled to any of these requested damages because
 16 these damages could only possibly arise should Boon prevail on any
 17 of the above claims." (Mem. Supp. Mot. Dismiss (doc. #19) at 13.)
 18 And, since "Boon's Amended Complaint should be dismissed, so
 19 [should] any related damage claims[.]" (*Id.*)

20 Here, I have recommended that the following claims be
 21 dismissed: Boon's federal discrimination and retaliation claims,
 22 Boon's IIED claim, Boon's wrongful termination claim, and Boon's
 23 state law discrimination claim. An element of all of Boon's
 24 claims is damages. If the claim gets dismissed its damages
 25 element goes with it, no separate motion is necessary. Thus,
 26 since I recommend Boon's contract claims and defamation claim
 27 against Union Pacific survive the motion to dismiss, the damages
 28 element survives as well.

1 However, to recover punitive damages, a plaintiff must prove
 2 "that the party against whom punitive damages are sought has acted
 3 with malice or has shown a reckless and outrageous indifference to
 4 a highly unreasonable risk of harm and has acted with a conscious
 5 indifference to the health, safety, and welfare of others." *Perry*
 6 *v. Rein*, 215 Or. App. 112 (2007) (quoting ORS 31.730)). Contract
 7 claims in Oregon will not support a claim for punitive damages.
 8 See *Eddings v. Pub. Storage*, 2008 WL 4838843, at *2 (D. Or. Nov.
 9 5, 2008) (noting the Oregon Supreme Court had previously reversed
 10 a lower's court award of punitive damages for a breach of contract
 11 claim). Accordingly, any claim to punitive damages, arising out
 12 of Boon's contract claims, should be dismissed. The defamation
 13 claim can support a punitive damages recovery so the allegation of
 14 punitive damages can survive only as to that claim.

15 **B. United**

16 United claims that Boon has failed to state a claim upon
 17 which relief can be granted.⁵ (Def. United's Mem. Supp. (doc. #17-
 18 1) at 6.) Boon's FAC does not specifically set forth which of her
 19 claims are directed to United. The majority of Boon's FAC is
 20 devoted to allegations against Union Pacific, however, Boon does
 21 include two specific references to United. First, Boon claims

23 ⁵ United also contends that this court has no jurisdiction
 24 under § 301 of the Labor Management Relations Act, 29 U.S.C. §
 25 185(a) ("LMRA"). (Def. United's Mem. Supp. (doc. #17-1) at 4.)
 26 Boon's FAC states that this action is brought pursuant to Title VII
 27 and the LMRA. (FAC ¶ 5.) The FAC does not state that this court
 28 has jurisdiction based solely on the LMRA, however. Rather, Boon
 claims that this court has original jurisdiction since this is a
 civil rights action arising under the Constitution or laws of the
 United States. (*Id.*)

1 that United condoned Union Pacific's discrimination of her because
 2 the union stewards were "in a position to, and in fact, were
 3 required by their respective contractual obligations towards
 4 Plaintiff, to investigate and report . . . Union Pacific's conduct
 5 as a union-filed grievance[.]" (FAC ¶ 14.) Second, Boon claims
 6 that United "failed and refused to properly investigate, or to
 7 take any action upon, Plaintiff's allegation of gender-based
 8 discrimination and retaliatory conduct." (FAC ¶ 24.)

9 **1. Title VII Discrimination and Retaliation**

10 Boon has set forth claims for gender-based discrimination and
 11 retaliation under Title VII of the Civil Rights Act. "To
 12 establish federal subject matter jurisdiction, a plaintiff is
 13 required to exhaust his or her administrative remedies before
 14 seeking adjudication of a Title VII claim." *Lyons v. England*, 307
 15 F.3d 1092, 1103 (9th Cir. 2002). Exhaustion requires that the
 16 complainant file a timely charge with the EEOC. *Id.* at 1104.
 17 Here, there is no allegation Boon has exhausted her administrative
 18 remedies against United. Even assuming, her EEOC charge against
 19 Union Pacific encompassed United, Boon did not file this action in
 20 a timely manner and lost her right to her right to file a civil
 21 suit on federal grounds. Accordingly, Boon is unable to allege a
 22 valid federal discrimination or retaliation claim against United
 23 and these claims should be dismissed.

24 **2. State Law Discrimination**

25 "[A] civil action . . . alleging unlawful employment practice
 26 must be commenced within one year after the occurrence of the
 27 unlawful employment practice." ORS 659A.875(1). This action was
 28 filed on September 2, 2010. Boon was terminated on June 20, 2008,

which was over two years prior to the filing of this suit. Any state law discrimination claim against United would therefore be untimely and should be dismissed. *See Leininger v. Pitts*, No. CV-07-1262-AS, 2008 WL 200022, at *2 (D. Or. Jan. 22, 2008) (noting that a *pro se* plaintiff's state law discrimination claim was untimely under ORS 659A.875(1) when faced with similar circumstances).

3. Defamation

It appears Boon only seeks to assert her defamation claim against Union Pacific. (FAC ¶¶ 43-53.) Boon has not asserted any allegations for defamation against United. Thus, if Boon intended any claim for defamation against United it should be dismissed for failure to state a claim.

4. Wrongful Termination

Similarly, Boon's claim for wrongful termination appears to be asserted only against Union Pacific. (FAC ¶¶ 32-36.) However, if Boon is attempting to assert a wrongful termination claim against United, such a claim fails because it is untimely. Moreover, Boon has not alleged that she was ever employed or discharged by United, which is a prerequisite to a wrongful termination claim. *See Robinson v. U.S. Bancorp*, No. CV-99-1723-ST, 2000 WL 435468, at*5 (D. Or. Mar. 17, 2000) (noting that, in order to have a viable wrongful termination claim, "[t]here must be a discharge, and that discharge must be wrongful.") Accordingly, if Boon intends to allege a wrongful termination claim against United, it should be dismissed with prejudice.

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1 **5. Boon's Breach of Contract and IIED**
 2 **Claims Are Subsumed by the Duty of Fair**
 3 **Representation**

4 United claims that Boon's breach of contract and IIED claims
 5 are subsumed by the duty of fair representation ("DFR"). (Def.
 6 United's Mem. Supp. (doc. #17-1) at 9.) I agree.

7 *Adkins v. Mireles*, 526 F.3d 531, 536 (9th Cir. 2008),
 8 instructive on this matter. In *Adkins*, the appellants had brought
 9 claims several claims against their labor union, including breach
 10 of the duty of fair representation, breach of contract, breach of
 11 the covenant of good faith and fair dealing, and IIED. *Id.* at
 12 536. The Ninth Circuit held that, "*the district court did not err*
 13 *in holding that federal law preempts Appellants' breach of*
 14 *contract, breach of covenant of good faith and fair dealing, . . .*
 15 *and [IIED] claims because each implicates the duty of fair*
 16 *representation.*" *Id.* (emphasis added). "[T]he duty of fair
 17 representation occupies the field of regulation of union-member
 18 relations when a union carries out its representational
 19 functions." *Id.* at 541-42. "[T]he statutory duty of fair
 20 representation displaces state law that would impose duties upon
 21 unions by virtue of their status as the workers' exclusive
 22 collective bargaining representative." *Id.* at 540.

23 Boon has made no showing of additional duties beyond the
 24 normal incidents of the union-employee relationship. See *id.* Boon
 25 claims that United failed to represent her fairly by failing to
 26 exercise their discretion with complete good faith and honesty,
 27 which is in effect a claim for breach of duty of fair
 28 representation. *Id.* In this case, as in *Adkins*, Boon's claims
 29 for breach of contract, breach of the covenant of good faith and

1 fair dealing, and IIED⁶ are effectively a claim breach of the duty
 2 of fair representation. The court must therefore evaluate the
 3 timeliness of such a claim.

4 In a duty of fair representation case, there is a six-month
 5 limitations period which begins to run when the employee knows or
 6 should have known of the alleged breach of the duty of fair
 7 representation by his union. *Galindo v. Stoeby Co.*, 793 F.2d
 8 1502, 1509 (9th Cir.1986); see also *Stone v. Writer's Guild of Am.*
 9 *West, Inc.*, 101 F.3d 1312 (9th Cir. 1996) (noting that a "claim
 10 for breach of the duty of representation is governed by the six
 11 month federal statute of limitations.") The Ninth Circuit made
 12 the pertinent observation that, "[i]n determining when the six-
 13 month period accrues, the simplest case is one where a union
 14 decides not to file a grievance; the cause of action generally
 15 accrues when the employee learns or should have learned of the
 16 union's decision." *Galindo*, 793 F.2d at 1509 (emphasis added).

17 Boon's FAC claims that BLET and United condoned Union
 18 Pacific's allegedly "improper and illegal activities" by failing
 19 "to investigate and report Defendant Union Pacific's improper
 20 conduct as a union-filed grievance[.]" (FAC ¶ 14.) The FAC seems
 21 to imply that this is a case where the union decided not to file
 22 a grievance; however, the record demonstrates that a grievance was
 23 filed on Boon's behalf. (Def. United's Mem. Supp. (doc. #17) at
 24 2; Compl. (doc. #1) ¶¶ 5, 7.) Based on this information, the
 25

26 ⁶ Boon's IIED claim implicates the duty of fair representation
 27 because, as in *Adkins*, it is inseparable from United's performance
 28 of their role as a collective bargaining representative. *Id.* at 541.

1 court construes this situation as one seeking "to overturn an
2 unfavorable arbitration award on the ground that the union
3 committed errors in the arbitration proceeding, [in which case]
4 the claim accrues when the employee learns of the arbitrator's
5 award." *Galindo*, 793 F.2d at 1509. Boon's original complaint
6 indicates that she was aware of an unfavorable appeal of her
7 grievance on September 2, 2008, or exactly two years prior to the
8 filing of this case. (Compl ¶ 7.) Even if court calculates the
9 accrual period using this favorable date, Boon's duty of fair
10 representation claim is untimely. Accordingly, Boon's duty of
11 fair representation claim should be dismissed with prejudice.

12 **Conclusion**

13 Service of the first amended complaint against all defendants
14 should be quashed. Alternatively, all claims against United and
15 BLET should be dismissed with prejudice.

16 With respect to Union Pacific, if plaintiff properly serves
17 Union Pacific or they accept service, the federal and state claims
18 for employment discrimination, the claim for IIED, and the claim
19 for wrongful termination should be dismissed with prejudice. With
20 proper service, the breach of contract claims and defamation
21 claim, insofar as it alleges publications at some unknown date
22 after plaintiff's termination, should survive the motion to
23 dismiss with respect to Union Pacific.

24 **Scheduling Order**

25 The Findings and Recommendation will be referred to a
26 district judge. Objections, if any, are due October 18, 2011. If
27 no objections are filed, then the Findings and Recommendation will
28 go under advisement on that date. If objections are filed, then

1 a response is due November 4, 2011. When the response is due or
2 filed, whichever date is earlier, the Findings and Recommendation
3 will go under advisement.

4 Dated this 30th day of September, 2011.

5 /s/ Dennis J. Hubel

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7 Dennis James Hubel
8 United States Magistrate Judge
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